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CHARLES ELMORE CRO
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931

NO. 432

WILLIAM E. LAMB, Petitioner

vs.

STERLING B. CRAMER, ET AL, Respondents

STATEMENT OF FACTS AND BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

GREEN, GREEN & JACKSON,
ROBERSON & COOK,
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of Counsel.

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STATEMENT OF FACTS AND BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition herein is for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit to review a judgment rendered by that court on April 9, 1931, reported in 48 Fed. (2nd), 537 (Rec. 207). The decree of the district court, which was rendered without other opinion, appears on pages 175-177 of the record herein. The petition for certiorari is requested under Section 347, Title 28, U. S. Code. The court is referred for a better understanding of this case to the companion case hereto, namely, No. 433, on the docket of this court wherein a

similar writ of certiorari is requested of the Circuit Court of Appeals for the Fifth Circuit on matters connected herewith.

I

JURISDICTION

The right of the petitioner to writ of certiorari from this court to review the decision of the Circuit Court of Appeals below is respectfully challenged on the following grounds:

1. The decision of the court below is not a final decision.

2. There is no special or important reason for the granting of the writ of certiorari asked for herein.

3. The writ of certiorari asked for here is not one to review a decision of the Circuit Court of Appeals, (a) where said decision is in conflict with the decision of another Circuit Court of Appeals on the same matter; or (b) where it has decided an important question of local law in a way probably in conflict with applicable local decisions; or (c) where it has decided an important question of general law in a way probably untenable or in conflict with the weight of authority; or (d) where it has decided an important question of federal law which has not been, but should be, settled by this court; or (e) where it has decided a federal question in a way probably in conflict with applicable decisions of this court; or (f) where it has so far departed from the accepted and usual course of judicial proceeding, or so far sanctioned such a departure by a lower court as to call for an exercise of this court's power of supervision.

4. The writ of certiorari asked for herein is not one which will be granted under the terms of Section 847, Title 28, U. S. Code.

II.

STATEMENT OF FACTS

1. In an equity case pending in the District Court of the United States wherein it was sought to set aside certain alleged fraudulent conveyances, and wherein a lien, both by statute of the state and rules of decision of the federal court, was claimed on certain property involved in said suit, an ancillary petition was filed (Rec. 122) as against petitioner here and others alleging the fraudulent transfer, pending suit, to petitioner of a part of the corpus of the funds sued for and upon which lien was claimed (Rec. 122), and alleging that petitioner and others (a) were in contempt of the court for such transfer (Rec. 125), and (b) that petitioner and others should be made parties to the original suit (Rec. 126), and that such transfers should be set aside and full relief be given to the plaintiffs in the original suit.

2. On the said ancillary petition an order was entered (Rec. 128) in the original equity suit making petitioner and other parties defendant to the original suit (Rec. 130) for all purposes, and especially (a) for the purpose of setting aside any such conveyances and ordering a turn-over, and (b) to show cause why petitioner and others should not be held in contempt for such transfers. Service of a copy of the order as a rule to show cause was ordered.

3. Petitioner here then filed in the district court (Rec. 147) in the original suit a full and complete answer to the charges made against him and asked that he be allowed to retain the sums alleged to have been obtained wrongfully (Rec. 166) and treated said ancillary petition as (a) petition to turn over money, or to set aside fraudulent conveyances, and (b) order to show cause as for contempt, answering both (Rec. 167) and prayed complete exonoration (Rec. 167) and at a later date, forgetting his prior general appearance by answer (Rec.

147-172) petitioner again appeared in court and by "motion to quash the citation," so called, (Rec. 173-175) challenged by Paragraph 15 of said "motion to quash the citation," the jurisdiction of the district court over the petitioner. Reference is here made to the following paragraphs in this "motion to quash the citation." Paragraph 11 (Rec. 174) where the ancillary petition is treated as misjoining; (a) a petition to turn over, and (b) a criminal contempt. Paragraph 12 (Rec. 174) objects to the form of the proceeding. Paragraph 1 (Rec. 173) objecting to the service of the ancillary petition. Paragraph 15 (Rec. 175) alleges the exemption of petitioner from service because petitioner was a non-resident attorney attending court in a foreign jurisdiction at the time service was made. (See Case No. 433 on this docket, U. S. Supreme Court this term).

4. In spite of the general appearance of the petitioner and his plea for exoneration and general relief (Rec. 147-172) the district court in chambers heard the "motion to quash the citation," and by decree in chambers (Rec. 175-177) without evidence of any kind, ordered (Rec. 176) "that the said motion of the said Wm. E. Lamb to quash the process and dismiss the petition for the citation of Wm. E. Lamb for contempt and for an order to turn over money paid him by the defendant be and the same is hereby sustained and the rule to show cause is hereby discharged, and the said petition is hereby dismissed, without prejudice to the rights of the plaintiff, the receiver, or any interested party, to proceed civilly in the matter as they, or any of them, may be advised and the said Wm. E. Lamb is dismissed hence without day," etc. The said quashal being made on the sole ground that petitioner being a non-resident attorney was not subject to service. (See Case 433, docket U. S. Supreme Court, this term).

5. Plaintiff, in the district court, then appealed the case to the Circuit Court of Appeals for the Fifth Circuit where the case appeared as No. 6004. In that

court the petitioner here moved to dismiss the appeal, (a) because the order appealed from was a judgment in criminal contempt in favor of appellee, or (b) was an order entered in a civil case which was not final and, therefore, not appealable. The case was heard by the Circuit Court of Appeals on the motion to dismiss and on the merits. Thereupon, the Circuit Court of Appeals reversed the decree of the lower court. See Judge Dawkin's opinion (Rec. 207-209) and order of court (Rec. 209). By reference to the opinion of Judge Dawkins (Rec. 207-209) it will be seen that the Circuit Court of Appeals in effect ruled that the ancillary petition and order, service on him of a copy of said order, and his answer and plea of exoneration made petitioner a party to the original case, and gave the district court full jurisdiction and it should not have quashed the citation.

III.

REASONS RELIED UPON IN OPPOSITION TO THE ISSUANCE OF THE WRIT.

1. Upon a reading of the statement of facts herein involved as set forth in II, **supra**, it will be seen that the propositions set forth in petition for writ of certiorari under heading A therein, Paragraphs 1, 2 and 3 are not really involved.

2. The reasons relied upon for the allowance of the writ as set forth under heading B in said petition for writ of certiorari, subdivisions 1, 2, 3, 4 and 5, are not valid:

(a) Because the judgment appealed from was not rendered in favor of petitioner in a criminal contempt case.

If we should extend this brief to an interminable length we could draw no better distinction between civil and criminal contempt than is drawn in the

opinion of Justice Lamar in the case of **Gompers vs. Bucks Stove & Range Co., 221 U. S. 418.** Upon a reading of that opinion it will be seen that this case does not involve any criminal contempt. Upon reference to the record of the ancillary petition filed in the original case (Rec. 122-126) it will be seen that, with reference to the petitioner Lamb, it was merely set forth under Paragraph 4 of the ancillary petition (Rec. 124) that petitioner Lamb had received approximately $90,000.00 of the funds involved in the original suit, and by Paragraph 5 (Rec. 125) of said ancillary petition that the manner of receiving the said $90,000.00 was contumaceous and in disregard of the equities and the power, right and authority of the court, and (Rec. 126) no relief was asked except that the petitioner be made a party to the cause, and that the court "grant to the plaintiffs full and complete general relief herein as to equity may seem meet," and that a temporary restraining order be issued enjoining further transfers or disposals of the property involved. On April 21 1930, (Rec. 128-131) the petitioner was made a party to the original suit and served with a copy of the decree making him such party, said decree containing (Rec. 130) order to show cause as for contempt for a turn over. Parts of the order applicable are as follows:

"It is hereby ordered, adjudged and decreed that a copy of this decree be forthwith served upon each of the above named parties, severally, and that they and each of them, severally and respectively, be commanded to be and appear before this Court, the Honorable Edwin R. Holmes, presiding as District Judge, at the Courtroom, in the Courthouse, at Clarksdale, Mississippi, at 9 a. m., April 22nd, 1930, then and there, severally and respectively, to show cause, if any they have or can, why they and each of them should not be adjudged to be in contempt of this Court under the allegations

as to them made that they and each of them accepted transfers of property in the possession of this Court with the intent to hinder, delay and defraud this Court in the exercise of its jurisdiction with reference to said property and every part thereof.

And it is further ordered, adjudged and decreed that said parties and each of them further appear at the time and place mentioned, and severally and respectively show cause, if any they have or can, why they should not be adjudged to hold all of said property described subject to the jurisdiction of this Honorable Court, to be dealt with by this Honorable Court as fully and completely as if said transfers had never been made, and said property and every part thereof had remained in the possession and under the control of this Honorable Court;

It is further ordered that said parties and each of them show cause, if any they have or can, why they and each of them should not be severally adjudged in cotempt of this Court and therefor punished in manner and form as equity and good conscience and the dignity and authority of this Court may demand.

It is further ordered that a copy hereof be delivered to the Marshal of this Court to be by him personally served upon each of the above named defendants, and that pursuant thereto that said named parties be made parties to this cause and do herein appear and show cause why that by plaintiffs asked should not be done, and why that the essential to maintain the dignity and authority of this Court be not performed." (Rec. 129-130).

Thereafter on the next day, to-wit, April 22, 1930, (Rec. 127) hearing on that part of the ancillary petition for a temporary injunction was waived and the injunction issued by consent order (Rec. 127) while the peti-

tioner was present in court as the attorney representing himself and the original defendants in the cause. Later petitioner answered fully. (Rec. 147-172).

It is, therefore, respectfully submitted that neither the ancillary petition (Rec. 122-127) nor the order (Rec. 128-131) and citation constituted, or were any attempt to have the petitioner answer a criminal contempt charge.

Gompers vs. Bucks Stove & Range Co., 221, U. S. 418

(b) The Circuit Court of Appeals had full jurisdiction to pass upon and review the district court on its order quashing the citation, (Rec. 175-177, inclusive) since the order and decree of the court appealed from was a final decree. In this connection see that part of the order of the district court (Rec. 176) "that the said motion of the said Wm. E. Lamb to quash the process and dismiss the petition for the citation of Wm. E. Lamb for contempt, and for an order to turn over money paid him by defendants, be and the same is hereby sustained, and the rule to show cause is hereby discharged and the said petition is hereby dismissed without prejudice to the rights of the plaintiff, the receiver, or any interested party, to proceed civilly in the matter as they, or any of them, may be advised; **and the said Wm. E. Lamb is dismissed hence without day,**" etc.

The dismissal of Wm. E. Lamb as a party to the case was final and just what he sought since he was a non-resident attorney and it was his contention that while attending the trial of a law suit in a foreign jurisdiction he could not be served with any writ. This action of the district court effectually terminated the particular case as to the petitioner and was final.

Wecker vs. National Elevator & Stamping Co., 204 U. S. 176.

Detroit & M. R. Company vs. Michigan R. R. Commission, 240 U. S. 564.

McAllister vs. Chesapeake & Ohio R. R. Company 243 U. S. 302.

Wilson vs. Republic Iron & Steel Co., 257 U. S. 92.

Rosenberg Bros. & Company vs. Curtis Brown Company, 260 U. S. 516.

Empire Trust Company, Et Al., vs. Brooks, 232 Fed. (C. C. A. 5) 641.

(c) The petitioner having been made defendant to the original case in the court below for the purpose (1) of setting aside the alleged fraudulent conveyances to him, or (2) to make him turn over money that belonged in the jurisdiction of the court, and having answered seeking exoneration (Rec. 147-172) was then a party to the original cause and the district court had jurisdiction over the subject matter as well as the parties, and had a right to try those matters summarily:

Long vs. Choctaw Oklahoma Co., 160 Fed. 365

Equity Rule 11.

Illinois Steel Co., vs. Putman, 68 Fed. (Fifth Cir-Circuit) 620.

Adams vs. Mercantile Trust Co., 66 Fed. (Fifth Circuit) 620.

Root vs. Woolworth, 150 U. S. 40

White vs. Ewing, 159 U. S. 36

Metcalf vs. Barker, 187 U. S. 165

Story's Equity Pleading, 10th Ed., Chap. 8, Section 342-343.

The fact that the decree in the district court (Rec. 131-146, inclusive) was signed and approved by one of the defendants and some of her attorneys, and the further fact that the following was inserted in the decree, "the parties plaintiff, and interveners expressly agreeing thereto in open court, and likewise said Florence T. Holland, are agreed to the matters and things in this decree contained;" (Rec. 146). The Planters Manufacturing Company not to be prejudiced hereby or Wm. E. Lamb, or Butler, Lamb, Foster & Pope not to be prejudiced hereby" does not make the said decree a consent decree, especially in view of the fact that the court in said decree (Rec. 134) "hereby reserves to itself full jurisdiction of this cause to make such other and further orders as it may deem proper, and as equity may require, both as to increasing the amount of the estate, and/or increasing the amount due and owing to any party plaintiff, and/or uncovering additional property and disposing of any adverse claims that may be interposed as against any portion of said estate;" and further, (Rec. 138) "This court reserves full jurisdiction of the cause to make any other and further orders which may be, from time to time, essential for the creation, preservation, and/or disposition of the relative rights of the several parties hereto, or any claimants, of any portion of the estate, now, or hereafter created."

The fact is those portions of the decree quoted show beyond dispute that (1) the hearing on the petitioner Lamb's matter was not to be prejudiced, and (2) full powers were reserved to dispose of that, therefore, the case in the lower court was pending in all of its bearings. The defendant Lamb was a party thereto and the district court had no right to dismiss him entirely on the motion "to quash the citation," therefore, the Circuit Court of Appeals had a perfect right to reverse the district court in this, and such a reversal is not in conflict with any other decision either of the Circuit Courts of Appeals or of this court.

(d) The decision of the Circuit Court of Appeals in this cause is not in conflict with the decisions of this court nor of any other circuit court of appeals. The petitioner in his brief at Page 6 has set forth five cases with which he alleges the holding here is in conflict.

Doyle vs. London Guaranty Co., 204, U. S. 599.

Matter of Christensen Engineering Company, 194 U. S. 458

Gompers vs. Bucks Stove & Range Co., 221 U. S. 418

Hultberg vs. Anderson, 214 Fed. 349

Clay vs. Waters, 178 Fed. 385.

Taking these cases up seriatim; the case of **Doyle vs. London Guaranty Company, supra,** the defendants were ordered "to produce within twenty days, in the office of the clerk of the court certain pay sheets, time books, etc." This was not done. A petition alleging disobedience of the above order was filed, and a rule to show cause as for contempt was issued. Subsequently upon the hearing of the rule to show cause, a judgment was entered "that defendants are guilty of contempt in disobeying the order referred to," and a further order was issued that if the defendants produced in the office of the clerk on or before a later date certain of the pay rolls, time sheets, they were ordered to pay no more than the costs, but if they failed, to be sentenced to imprisonment for 60 days and a writ of error was allowed to the Circuit Court of Appeals. This court held that the Circuit Court of Appeals had no jurisdiction of the writ of error because there had been no final order, and citing the very case cited by counsel in this case above, viz: **Bessette vs. W. B. Conkey Co., 194 U. S. 324,** and the **Matter of Christensen Eng. Co., supra,** this court says "as the result of those decisions we deem it settled that an order punishing for contempt made in the progress of

the case, when not in the nature of an order in a criminal proceeding, is regarded as interlocutory, and to be reviewed only upon appeal from a final decree in the case. The **Doyle** case was an appeal by the defendant. This court further held on **Page 603, 204 U. S.** that in the **Christensen** case and the **Bessette** case, **Supra,** this court had no jurisdiction to review judgment in contempt proceedings, criminal in their nature. The **Gompers vs. Bucks Stove and Range Company** case, **supra,** was held by the court to be a criminal contempt case and Justice Lamar went fully into the distinction between civil and criminal contempt. Of course, any judgment for criminal contempt in favor of the defendant is not appealable. The **Hultberg case, supra,** was a case decided by the Circuit Court of Appeals for the Seventh Circuit wherein the witnesses refused to testify before a master or commissioner, and upon being called before the court in answer to a rule issued on petition filed, the witness was discharged at the cost of the petitioner. The Circuit Court of Appeals held that the release of the defendant in the criminal contempt charge was not appealable, or reviewable. In the case of **Clay vs. Waters, supra,** the Circuit Court of Appeals for the Eighth Circuit, on an appeal from the judgment of the district court wherein the defendant was held guilty of criminal contempt and imprisoned for nine months with leave to purge the contempt and be released by payment or turn over, was a criminal contempt decided against defendant and was reviewable, and the order of the district court was affirmed.

It will be seen, therefore, that none of the cases cited by counsel are in conflict with the Circuit Court of Appeals for the Fifth Circuit in this case when it held (Rec. 209) "for the reasons stated in cause No. 6072, this day decided, we think the funds were in the constructive possession of the court to the knowledge of Lamb and his clients, and that plaintiffs were at liberty to proceed either by bill in equity, as was done, and/or by rule for contempt, or by both means, to compel their

restoration to the custody of the court's officers. We are, of the opinion, therefore, that the rule did state a ground for relief and the service under the circumstances was properly made. The decree below dismissed the rule by quashing the service and hence was undoubtedly final, notwithstanding the reservation of the right 'to proceed civilly.' "

(e) The decision of the Circuit Court of Appeals reversing the district court is not final since the effect of the Circuit Court of Appeals' decision is to send the petitioner back to the district court to answer the rule, or rather to try the case on his answer already filed therein and the effect of this petition for certiorari is to present to this court a question, as to whether or not the petitioner shall appear in the district court in which he has already answered, to try the merits of his cause.

BRIEF AND ARGUMENT IN OPPOSITION TO THE GRANTING OF THE WRIT OF CERTIORARI

The writ of certiorari is asked here under and by virtue of **Section 347, Title 28, U. S. Code.** This section was **Judicial Code, Section 240,** amended February 13, 1925, to read as at present. Under Section 240 of the Judicial Code prior to the amendment of February 13, 1925, it was consistently held by this court:

1. The jurisdiction to issue certiorari will be exercised sparingly and only in cases of peculiar gravity and general importance:

Lau Ow Bew, 141 U. S. 583

Lau Ow Bew vs. U. S., 144 U. S. 47

American Construction Company vs. Jacksonville Railroad Company, 148 U. S. 372

Forsyth vs. Hammond, 166 U. S. 506

Hamilton Brown Shoe Co., vs. Wolf, 240 U. S. 251

Houston Oil Co., vs. Goodrich 245 U. S. 440.

We judge from the remarks of Mr. Justice McReynolds in the case of **Furness-Withy vs. Yang-Tsze Ins. Asso.**, that under the statute as it then stood (Oct. 1916) hundreds of additional cases were being taken to the Supreme Court by certiorari, and that, therefore, it was necessary to give them the closest attention and to allow the writ only when absolutely necessary.

Furness-Withy & Co. vs. Yang-Tsze Ins. Asso., 242 U. S. 430.

In fact it has been held that certiorari will not be granted where there is any other remedy, and since in the present case this petitioner has the remedy of going back to the district court and having his case tried on the merits and then appealing to the Circuit Court of Appeals before asking for the writ of certiorari, his remedy is plain and adequate.

In re Tampa Suburban R. R. Co., 168 U. S. 583.

In re Huguley Mfg. Co., 184 U. S. 297.

This court has consistently held that while the writ of certiorari is discretionary it is only granted upon extraordinary reasons and is often denied when the power to issue is unquestioned.

Hyde vs. Shine, 199 U. S. 62

Re Hitz 111, U. S. 766

American Const. Co. vs. Jacksonville, Etc., Co., 148 U. S. 372.

Mr. Chief Justice Taft said in the case of **Magnum Import Company vs. Coty:**

> "The question how the court should exercise this power next arises. The jurisdiction to bring up cases by certiorari from the Circuit Court of Appeals was given for two purposes; first, to secure uniformity of decisions between those courts in the nine circuits, and, second, to bring up cases involving questions of importance which it is to the public interest to have decided by this court of last resort. The jurisdiction was not conferred on this court merely to give the defeated party in the Circuit Court of Appeals another hearing. Our experience shows that 80 per cent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ."

Magnum Import Co., vs. Coty, 262 U. S. 159.

The true rule is that even though the writ be granted to the Circuit Court of Appeals such cases will not be reversed on certiorari unless it amounts to a miscarriage of justice.

2. Justice Taft held that this court would not entertain requests for certiorari of an ordinary patent case unless it be necessary to reconcile decisions of the Circuit Court of Appeals on the same patent.

The petitioner herein seems to think that this court will issue the writ of certiorari to review the Circuit Court of Appeals decision because in the opinion of petitioner that decision conflicts in principle with certain decisions of circuit courts of appeals in other cases not related to the present. We do not understand this to be the rule.

Mr. Chief Justice Taft said in the **Keller vs. Adams** case:

> "Such an ordinary patent case, with its issues of inventions, breadth of claims, and non-infringe-

ment, this court will not bring here by certiorari unless it be necessary to reconcile decisions of the Circuit Court of Appeals on the same patent. We, therefore, find ourselves mistaken in assuming that an important issue of general patent law, under Section 4916, Rev. Stat. (Comp. Stat. Sec. 9461, 7 Fed Stat. Anno. 2nd, Ed. P. 211) is here involved. The result is that an order must be entered dismissing the writ of certiorari as improvidently granted at the cost of the petitioner. Layne & B. Corp. vs. Western Well Works, 261 U. S. 387, 67 L. Ed. 712, 43 Sup. Ct. Rep. 422; Furness W. & Co. vs. Yang-Tsze Ins. Asso., 242 U. S. 430, 61 L. Ed. 409, 37 Sup. Ct. Rep. 141; United States vs. Rimer, 220 U. S. 547, 55 L. Ed. 578, 31 Sup. Ct., Rep. 596; Keller vs. Adams, 264 U. S. 314."

3. If upon examination of such a case there is no real conflict of such decision the petition will be dismissed.

Layne & B. Corporation vs. Western Well Works, Inc., 261 U. S. 387.

In the **Layne & Bowler** case, **supra**, Judge Taft also remarked that since there was no conflict in the decisions of the Circuit Courts of Appeals on the same patent, the writ of certiorari in that case would be dismissed stating:

"If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on its merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of **importance to the public** as distinguished from **that of the parties** and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal. The present case certainly comes under neither head."

4. Certiorari will not be granted where there is any other remedy.

In Re Tampa Sub. R. R. Co., 168 U. S. 583.

5. That the judgment of the Circuit Court of Appeals of which certiorari is asked must be final.

Geo. A. Fuller Co. vs. Otis Elevator Co. 245 U. S. 489.

In the **Fuller** case, **supra,** Mr. Justice Holmes delivered the opinion in the case and held:

> "It is objected to the writ of certiorari in this case that there was no final judgment; but the writ when issued to the court of appeals is not limited to cases in which final judgment has been entered, but only to cases in which the judgment when entered is final."

Of course, the judgment from which the writ of certiorari was asked in the **Fuller** case was under **Judicial Code 251** which has now been repealed but the words quoted by Justice Holmes as follows:

> "With the same power and authority in the case as if it had been carried by writ of error on appeal to said Supreme Court."

are still substantially also a part of **Section 347, Title 28, U. S. Code** under which the present writ of certiorari is requested as follows:

> "With like effect as if the cause had been brought there by unrestricted writ of error or appeal."

We take it that the last quoted words in **Section 347, Title 28, U. S. Code,** mean just what Justice Holmes said, namely, that while the power is given to issue a writ of certiorari, to Circuit Court of Appeals directing it to send

up the record in a case, either before or after a judgment or decree by such lower court, yet when the record is sent up after a judgment granted by the Circuit Court of appeals it must be on one which was final.

Denver vs. New York Trust Co., 229, U. S. 123.

6. That the passage of **Section 347 Title 28, U. S. Code An.,** which is the amendment of **Section 240, Judicial Code** by act February 13, 1925, **43 Statutes at Large 938,** did not change the grounds or causes for the issuance of writs of certiorari, or make writs of certiorari procurable under any less extraordinary circumstances is evident from the fact that this court in the revision of its rules adopted June 5, 1928, effective July 1, 1928, more than three years after the amendment of February 13, 1925, aforesaid, did not change that part of former Rule 35 contained in Paragraph 5 thereof, which provides that "a review on writ of certiorari is not a matter of right but of sound judicial discretion, and will be granted only where there are special and important reasons therefor." And then continues to give the rules generally used in measuring the court's discretion. (Reference is here made to the rule of this court No. 38).

7. It is recognized, of course, that the Supreme Court of the United States also has the right to issue writ of certiorari in cases not provided for by Section 347, Title 28, U. S. Code, under the provisions of the other Section 377, Title 28, U. S. Code, Anno., but since the latter is rather a provision extraordinary and for the issuance of writs not specifically provided for by statute, we judge that the reasons herein given for not issuing the writ under Section 347, Title 28, U. S. Code, would apply with a greater force to requests to issue the writ under Section 377, Title 28, U. S. Code.

8. We have not attempted to answer in detail the argument of petitioner as set forth under subdivision V, Pages 9, 10 and 11 under Paragraphs 1, 2 and

3 of his brief because of the fact that he erroneously, in our opinion, bases his argument on grounds which are not valid and upon assumptions which are not justified. For instance, under Paragraph 1, Subdivision V, the argument is made that the decision of the district court was a decision in favor of the petitioner in a criminal contempt, which our brief herein has demonstrated is clearly in error. And under Paragraph 2, subdivision V, the argument is made that the judgment of the Circuit Court of Appeals was wrong because error in the appeal was only alleged on the ground that the order of the district court quashed "the service of the citation" instead of alleging that it quashed "the citation." And counsel argues that such an allegation of error was frivolous and that the Circuit Court of Appeals decided the case on the error of the district court in quashing "the citation" instead of the error of the district court in quashing "service of the citation." This is rather involved and appears to us to be more frivolous here than the alleged frivolity of error specified in the Circuit Court of Appeals. To sustain an argument on this ground petitioner cites three cases, namely: **Slacker vs. O'Conner 278 U. S. 188; Midland Bank vs. Ins. Co., 277 U. S. 346; Fayerweather vs. Ritch, 195 U. S. 276.** In answer to these three cases we say the **Slacker vs. O'Conner** case, **Supra,** was an appeal (Nov., 1928) from the Circuit Court of Appeals, Eighth Circuit, and this court held that the appeal (on writ of certiorari) was from a decree in the court below not final and taken under **Jud. Code, Section 240 B,** which is **Section 347, U. S. Code, Title 28,** where an appeal was only provided for in cases where the validity of a state statute is drawn in question, etc. With due deference to petitioner, we cannot see the application of that case to this.

In the case of **Midland Bank vs. Ins. Co., supra,** writ of certiorari was granted to the United States Circuit Court of Appeals for the Eighth Circuit, and that court was reversed because this court held that the

action of the Circuit Court of Appeals was not justified on the record before it in holding the policy of insurance involved was an illegal contract because there was nothing in the evidence received tending to show such illegality. With due deference, the applicability of that case to the case involved is not recognized.

We have already herein quoted a large part of the record and referred to enough thereof to show this court that the action of the Circuit Court of Appeals in this instance was correct and founded entirely on the record, and the errors assigned in the district court. The errors assigned in the district court appear in Rec. Pg. 179 to 180, inclusive, and appear to be only two in number and to the effect that the proceedings against petitioner in the district court were ancillary proceedings (Rec. Pg. 179) to Cause No. 129, and effectual to make the petitioner a party to the cause (Rec. Pg. 180), and second, (Rec. 190) that the answer and appearance of petitioner constituted upon his part a waiver of any plea to the jurisdiction of the district court, and, "Therefore, it is respectfully suggested and assigned here as error that the court erroneously sustained the motion to quash the **'service'** of process filed herein on the_____day of _____, 1930, for the causes set out in said motion to quash."

If counsel means by this part of his argument that the appellants there called the motion filed by petitioner a "motion to quash the service of process" instead of as petitioner there called it, "motion to quash the citation" (Rec. 173-175), we respectfully submit that the words contained in the assignment of error "for the causes set out in said motion to quash" referred to the motion whatever it might be, and that the motion itself was before the Circuit Court of Appeals and such a finely drawn argument here is not sufficient upon which to base a request for writ of certiorari.

The case of **Fayerweather vs. Ritch, supra,** was a direct appeal to the Supreme Court of the United States

from the Circuit Court of the United States for the Southern District of New York, and the decree of the circuit court was affirmed. The appeal was taken because the case involved the application of the Constitution of the United States and has, with due deference, no application to this case.

Under Paragraph 3, subdivision V, Pg. 12, of his argument in support of the petition, petitioner again relies upon the fact that the judgment of the district court from which an appeal was taken to the Circuit Court of Appeals, herein was not a final judgment and quotes again the five cases already herein disposed of under Paragraph III, 2b herein.

We submit that the argument being founded on erroneous conclusions is not applicable.

SUMMARY

The petitioner herein has no right to the writ of certiorari (a) because the decision of the court below is not in conflict with either decisions of this court, or any other circuit; (b) because the matters involved are not of general importance; (c) because the decision from which certiorari is asked has been entered by the Fifth Circuit Court of Appeals and was not a final decision; (d) because the decision in the Circuit Court of Appeals was correct.

It is, therefore, respectfully submitted that the writ herein prayed for should be denied.

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